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Wernecke v. St. Maries Joint School District No. 401 Respondent's Brief Dckt. 34539

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IN THE SUPREME COURT OF THE STATE OF IDAHO

PATSY WERNECKE,

Claimant-Appellant,

vs.

**ST. MARIES JOINT SCHOOL DISTRICT
#401, Employer, and STATE INSURANCE
FUND, Surety,**

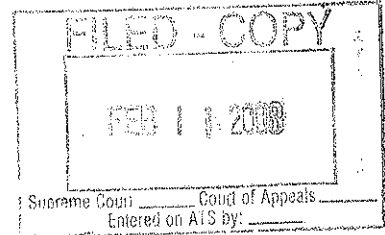
Defendants,

and

**STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,**

Defendant-Respondent.

Supreme Court
Docket No. 34539



RESPONDENT'S BRIEF

Appeal from the Industrial Commission, State of Idaho

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Respondent, State of Idaho, Industrial Special Indemnity Fund ("ISIF") submits its Respondent's Brief as follows:

I.

FACTS AND PROCEDURAL HISTORY

Appellant, Patsy Wernecke appeals the Industrial Commission's Order on Petition for Declaratory Ruling, entered on January 19, 2007 (**CR**, pp. 142-144). Appellant's primary contention is that the Commission erred in finding that Ms. Wernecke's earlier lump sum agreement with ISIF, entered February 8, 1994 (**CR**, pp. 8-15), precluded her from asserting additional liability against ISIF for total and permanent disability benefits in a Complaint filed by Ms. Wernecke against ISIF on April 26, 2006.

The facts in this matter are basically not in dispute and Respondent will not merely repeat the same factual matters set forth in Appellant's brief. However, ISIF would note and/or highlight some points in addition to those raised in the Statement of Facts submitted by Appellant.

When Ms. Wernecke first brought a cause of action against ISIF with regard to her 1990 injury, she was represented by the same attorneys who assisted her in prosecuting the current suit against the ISIF. Further, in that first suit, Ms. Wernecke claimed that she was totally and permanently disabled, unable to work and that ISIF was liable for a portion of her worker's compensation benefits because of her pre-existing permanent physical impairments and/or conditions. **CR**, p. 9. ISIF contested the issues of whether Ms. Wernecke was totally and permanently disabled, whether she had a permanent pre-existing physical impairment and whether the pre-existing

impairment combined with the latest industrial accident in order to cause Ms. Wernecke's disability. **CR**, p. 9.

As these issues were being litigated, the parties, including Ms. Wernecke and her attorneys, determined that a lump sum settlement agreement was the best manner to resolve the claim. Wernecke agreed to a lump sum payment of \$6,500 to resolve her claim. Since the inherent nature and purposes of the ISIF under the worker's compensation system is to provide benefits for workers who have become totally and permanently disabled as the result of the combination of a pre-existing permanent impairment and a subsequent industrial injury, it obviously may only be liable for the payment of total and permanent disability benefits one time per claimant (i.e., a claimant may not become totally and permanently disabled more than once). Thus, Wernecke's lump sum agreement with ISIF provided that the settlement was in consideration for "any and all claims that Claimant may now or hereafter have, including but not limited to every claim of whatever nature or kind ... for benefits against the Fund under the Workers' Compensation Laws of the State of Idaho. **CR**, p. 11.

Wernecke's attorneys counseled her with regard to the meaning and import of the Agreement and duly advocated for the entry of the Lump Sum Settlement Agreement to the Idaho Industrial Commission. **CR**, p. 12. Wernecke also confirmed that she requested the Agreement, understood its contents and specifically understood that she was waiving the right to assert any future claims against ISIF. **CR**, p. 13. The parties further agreed to waive any right of appeal with regard to Wernecke's claim or to seek reconsideration of the award. **CR**, p. 13. The Industrial Commission reviewed the

Lump Sum Agreement and, after determining that it was in the best interests of all parties, including Ms. Wernecke, approved the Agreement. **CR**, p. 15.

Notwithstanding the clear terms of the Agreement, Wernecke filed the current suit against ISIF on April 26, 2006. See **Appendix**, Exh. A. Wernecke claimed that, while working and cleaning tables for the school, she sustained injury to her right shoulder when the leg of a table she was moving fell off and the table dropped. *Id.* The injury allegedly occurred as Claimant caught the table and took its full weight. *Id.* Claimant asserts that her injuries and preexisting conditions, including chronic back pain, cholecystectomy, repair of patellar fracture right, bursectomy of prepatellar bursa left and neck fusion renders her totally and permanently disabled.

II.

ISSUES

1. Does ISIF have authority under Idaho law to resolve its liability for total and permanent disability benefits through a lump sum settlement agreement?
2. Does the February 8, 2006 lump sum agreement between the ISIF and Ms. Wernecke violate Idaho Code § 72-318 or other applicable law?
3. Is Wernecke's April 26, 2006 Complaint against ISIF asserting benefits for total and permanent disability barred pursuant to the doctrine of Res Judicata and/or Collateral Estoppel?
4. Does Wernecke's prior acceptance of the February 8, 2006 lump sum agreement serve as a waiver and/or estop her from attempting to pursue further remedies against ISIF in this proceeding?

III.

STANDARD OF REVIEW

In reviewing an appeal from the Industrial Commission, this Court will uphold the findings of the Commission if they are supported by substantial and competent evidence in the record. *I.C. § 72-732; Lethrud v. State*, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995). Evidence is "substantial and competent" if a reasonable mind might accept such evidence as adequate and sufficient to support a conclusion. *Reiher v. American Fine Foods*, 126 Idaho 58, 60, 878 P.2d 757, 759 (1994). In reviewing a decision from the Commission, all facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). However, the Commission's conclusions of law are freely reviewed by the Court. *Idaho Const. art. V, § 9; Davaz v. Priest River Glass Co.*, 125 Idaho 333, 336, 870 P.2d 1292, 1295 (1994).

The interpretation of a statute and contract is a question of law over which this Court exercises free review. *Carrier v. Lake Pend Oreille School Dist. #84*, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006); *First Sec. Bank, N.A. v. Murphy*, 131 Idaho 787, 964 P.2d 654 (1998). Whether res judicata or collateral estoppel bars the re-litigation of issues adjudicated in prior litigation between the parties is likewise a question of law subject to free review. *Smith v. U.S.R.V. Properties, LC*, 141 Idaho 795, 798, 118 P.3d 127, 131 (2005).

IV.

ARGUMENT

A. ISIF is Vested with the Authority to Resolve Liability Claims against it through Settlement and Lump Sum Agreements

One of Wernecke's initial arguments on appeal is that ISIF is not legally entitled to enter into agreements with claimants settling claims of permanent disability where ISIF denies liability for total disability payments. This contention is not in line with controlling law. Under *Idaho Code § 72-324*, ISIF's manager is granted the power to "make agreements, subject to the approval of the Industrial Commission, for compensation of injuries..."

Though Wernecke appears to argue that a compensation agreement under *Idaho Code § 72-111* may only be entered into between employers and an afflicted employee, such is contrary to established precedent. See, e.g., *Drake v. State*, 128 Idaho 880, 920 P.2d 397 (1996) (any liable party and an injured employee are permitted to enter into a settlement with regard to compensation, but the agreement must be approved by the Commission).

Wernecke's argument would essentially entail the ISIF being prevented from ever entering into any agreement with a claimant in order to discharge its liability. Clearly, such a result is not mandated by the Act or any provision of Idaho law. Further, in the last 28 years alone, the ISIF has entered into over 1,045 Lump Sum Settlement Agreements or other compensation agreements. *CR*, p. 6.

Claimant's contention that ISIF may only enter into agreements with a claimant whom the ISIF acknowledges is totally and permanently disabled and which the agreement merely provides the method and structure for payment of benefits is

completely unsupportable by Idaho statutory or case law. The ISIF may clearly enter into settlement agreements to discharge its obligations under Idaho Code §72-332.

B. The Lump Sum Settlement Agreement between Wernecke and ISIF was not in Violation of Idaho Code § 72-318 or §§ 72-332

Wernecke has primarily opposed the Commission's Order on Petition for Declaratory Ruling on the basis that the 1994 Lump Sum Settlement Agreement at issue is invalid under Idaho's worker's compensation law. Initially, ISIF would note the irony of Wernecke's counsel's position in this matter. Though counsel for Wernecke piously argues that the 1994 Agreement was merely an unlawful attempt by the ISIF to avoid its obligations under Idaho law, it should be remembered that Wernecke, through the same counsel that has prosecuted this appeal, advanced the Agreement in question and advocated for its acceptance in front of the Commission in the earlier suit. Claimant received her consideration for the Lump Sum Settlement Agreement and counsel took fees associated with the settlement. There is no contention in this matter that Wernecke was forced to sign the agreement, was not adequately represented by counsel or that she was never apprised of her rights and the full consequences of executing the settlement agreement.

Now, after having accepted the benefits of the 1994 settlement, Wernecke contends that the Agreement was unlawful and that she was prejudiced and denied rights to compensation by agreeing to a settlement to which her counsel advanced during the initial litigation in this matter. ISIF would contend as an initial matter that such a position is contrary to the general dictates of fairness and substantial justice that should exist in these types of proceedings. Moreover, the principles of good faith and finality of results is clearly violated when a party advocates for the illegality of their own

agreements in an attempt to cure their own past mistakes or claim an advantage in future litigation.

Beyond the issues of the proper interpretation of worker's compensation statutes and/or the application of collateral estoppel in this matter, ISIF implores this Court not to reward Wernecke's tactic of accepting the benefit of a settlement in connection with a worker's compensation claim while then later arguing for its illegality in an attempt to procure additional benefits from the ISIF. Otherwise, the policy of encouraging settlement of claims would be severely undermined, as parties would lack confidence in the finality of judgments based on Lump Sum Settlement Agreements and there would be legitimate concerns of never-ending litigation in worker's compensation proceedings.

1. Idaho Code § 72-318

Wernecke initially argues that the 1994 Lump Sum Settlement Agreement was an invalid agreement to waive rights to compensation under I.C. § 72-318(2). That statute provides that "[n]o agreement by an employee to waive his rights to compensation under this Act shall be valid." *I.C. § 72-318(2)*. Certainly, no appellate case law could be found supporting the proposition that § 72-318 prohibits the ISIF from resolving future claims for liability through a lump sum agreement.

Wernecke attempts to support her position that the Agreement is invalid under § 72-318 through the use of a recent Idaho Supreme Court case. See *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 11 P.3d 92 (2005). In *Emery*, the Court found that a claimant's voluntary dismissal of a worker's compensation claim with prejudice does not constitute an invalid waiver to rights of compensation under I.C. § 72-318. The Court noted in dicta that the stipulation at issue did not relieve the employer for all injuries the

worker might suffer while employed at Simplot. *Id.* However, the Court did not state that an agreement, such as the one disputed in this case, would be presumptively violative of § 72-318. Further, the facts of this case differ in material respects even if **Emery** did have some application here.

First, ISIF would note that the Idaho Supreme Court has clearly stated that § 72-318 only prohibits an agreement by an employee to relieve an employer of an obligation that the employer has because of the workers' compensation laws. See **Osick v. Public Employee Ret. Sys.**, 122 Idaho 457, 461, 835 P.2d 1268, 1272 (1992); see also **Burdick v. Thornton**, 109 Idaho 869, 712 P.2d 570 (1985). From all of the case law interpreting I.C. §72-318, it appears clear that the statute is intended to prevent employers from advancing agreements with their employees, outside of the litigation process or unrelated to an actual compensation claim, that may limit an employee's rights under the Worker's Compensation Act.

Certainly, ISIF is not an employer and the statute does not address agreements between a claimant and ISIF. More importantly, as **Emery** and the other cases above make clear, the statute is not intended to regulate judgments made in connection with a settlement agreement in a litigation setting. If so, any lump sum settlement agreement in which a claimant settles his claim for less than full value claimed would be categorized as an unlawful waiver under I.C. § 72-318(2).

To the extent § 72-318 has any application in a litigation setting with regard to settlement agreements, its scope would clearly be limited to agreements involving the employee/claimant and its employer. Clearly, the purposes of the worker's compensation system would be thwarted if an employer could procure a waiver from its

employee from asserting a future suit for injury. A worker could suffer multiple industrial accidents while working for a certain employer and the nature of Idaho's worker's compensation system dictates that the same employer may be liable for separate injuries. Allowing an employer to bargain its way out of liability for future injury would be akin to allowing a tort defendant in a car accident case from procuring a release from the injured plaintiff relieving the defendant from liability for all future negligence for which the defendant may be responsible. Certainly, the principles of substantial justice would never approve of such a result.

However, Wernecke consistently misunderstands ISIF's role in the worker's compensation system, which leads her to misunderstand the legality of ISIF's attempts to limit multiple claims asserted against it by the same injured worker. According to **Idaho Code § 72-332**, liability against ISIF is implicated only under the following circumstances:

(1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

Thus, the ISIF is not liable in every worker's compensation case. Liability may be imposed upon the ISIF only where the claimant is asserting total and permanent disability because of the combination of a permanent pre-existing physical impairment and a new industrial injury.

The ISIF cannot, then, be subjected to multiple successful suits by the same claimant – an injured worker may only be classified as totally and permanently disabled once. Clearly, there would be no incentive or purpose in the ISIF settling a total and permanent disability claim if there was an opportunity for the claimant to continue asserting further total and permanent disability claims. It would not serve the interests of the worker's compensation system if ISIF were forced to fully litigate every total and permanent disability claim. Where the issue of the claimant's assertion of total and permanent disability is disputed, the parties should be able to reach settlement. However, the claimant should not be able to claim prejudice in being unable to argue their disabled status against the ISIF in a future proceeding.

In this case, Wernecke accepted payment from ISIF under the Lump Sum Settlement Agreement in regards to a claim of total disability. It makes perfect sense that ISIF, as part of that Agreement, would endeavor to prevent Wernecke from asserting future claims for total disability when payment had already been made under such a claim. Further, there is little justification for the proposition that a worker should be able to assert benefits on a number of occasions for claiming total disability.

2. Idaho Code § 72-332

Wernecke next argues that the Agreement violates *I.C. § 72-332* since it did not completely compensate her for total and permanent disability. This argument presumes that ISIF has no option in a worker's compensation proceeding to which it is a party other than to be found not liable for benefits or to pay its full share of benefits for a claimant's total and permanent disability. As noted above, the ISIF has the power and authority to resolve claims through settlement. To the extent Wernecke's argument in

this regard is directed to the contention that a payment for \$6,500 did not adequately compensate her under § 72-332, the point should not be well taken. Indeed, the argument is a red herring in this matter.

The ISIF's responsibility to compensate a claimant under § 72-332 is contingent upon the Claimant providing proof that they are permanently and totally disabled. See *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989). In the initial proceeding in this matter, Wernecke attempted to prove total disability and the ISIF opposed that classification. Instead of both sides presenting their proof to the Commission on the matter, the parties agreed to settle the claim. Thus, Wernecke was compensated for her claim of total disability.

The fact that Wernecke now feels that the amount she received in the settlement did not adequately compensate her for her claim of total disability is immaterial to the analysis on appeal. ISIF has the statutory right to enter into agreements with claimants with regard to their disability claims and the Commission approved the agreement in regards to Wernecke, which became a final judgment when entered. Therefore, it is somewhat disingenuous for Wernecke to assert that ISIF has avoided its statutory mandate to compensate claimants who are found to be totally disabled by its actions in this matter. Wernecke was never found to be totally disabled and accepted settlement of her disability claim in a manner that is consistent with dictates of the Worker's Compensation Act.

3. The Application of Idaho Code §§ 72-711, -718 Resolves the Issues Raised on Appeal

A review of the proceedings in this matter demonstrates that Wernecke is not technically attacking the Lump Sum Settlement Agreement she voluntarily entered with

ISIF. Rather, Wernecke is ultimately taking issue with the final judgment entered by the Industrial Commission with regard to her 1990 worker's compensation complaint. See **CR**, p. 15. As **Idaho Code § 72-711** clearly provides, an agreement approved by the Commission "shall for all purposes be an award by the commission." See also **Drake v. State**, 128 Idaho 880, 920 P.3d 397 (1996) (An approved agreement constitutes a final decision of the Commission). Thus, the issue in this case should not be framed as whether Wernecke entered into an invalid agreement waiving rights to compensation, but rather whether Wernecke may reopen the judgment of the Commission.

When the Commission approved the Lump Sum Settlement Agreement, the Agreement merged into the judgment and the Agreement became the decision of the Commission on the matter. If Wernecke had any claim of prejudice or error, her remedy was to timely move to have the Commission reconsider the judgment, i.e., under **Idaho Code § 72-718**, and/or the use of applicable appeal procedures. Wernecke failed to utilize those procedures. Thus, the "decision of the Commission, in the absence of fraud, [was] final and conclusive..." See **Idaho Code § 72-718; see also Sadiku v. Aatronics, Inc.**, 128 P.3d 947, 142 Idaho 410 (2006).

Clearly, Wernecke may not now seek to re-open the Commission's decision. In fact, Wernecke has not provided (nor could Respondent locate) any statutory or appellate authority supporting the proposition that this Court may re-open or reverse the Commission's February 8, 1994 Order of Approval and of Discharge Upon Lump Sum Payment (**CR**, p. 15) since Wernecke did not timely appeal that Order. On this basis alone, this Court should dismiss Wernecke's appeal.

C. The Doctrines of Res Judicata / Collateral Etoppel Bar Wernecke's Current Suit against ISIF

Wernecke next asserts that she is not barred from asserting a new suit against ISIF in this matter since this proceeding arises out of a new injury, necessarily involving a new and separate claim and new facts, the merits of which were never decided by the prior agreement or adjudication. However, the doctrine of collateral estoppel clearly applies in this case to bar Wernecke's current suit, as the Commission conclusively decided on February 8, 1994 that Wernecke would not be able to assert any future claim for liability against ISIF for total and permanent disability benefits.

"*Res judicata*" is comprised of claim preclusion (true *res judicata*) and issue preclusion (collateral estoppel). "Under the principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim." **Hindmarsh v. Mock**, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims "relating to the same cause of action . . . which might have been made." *Id.* Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. **Rodriguez v. Dep't of Corr.**, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001).

Separate tests are used to determine whether claim preclusion or issue preclusion applies. See **D.A.R., Inc. v. Sheffer**, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000). Five factors are required in order for issue preclusion to bar the re-litigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually

decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. ***Ticor Title Co. v. Stanion***, 2007 Ida. LEXIS 63, 157 P.3d 613, 618 (2007).

Res judicata serves three fundamental purposes: (1) it preserves the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results; (2) it serves the public interest in protecting the courts against the burdens of repetitious litigation; and (3) it advances the private interest in repose from the harassment of repetitive claims. ***Hindmarsh***, 138 Idaho at 94, 57 P.3d at 805 (quoting ***Aldape v. Akins***, 105 Idaho 254, 257, 668 P.2d 130, 133 (Ct. App. 1983)).

The doctrine of *res judicata* is recognized and applied in worker's compensation proceedings. See ***Idaho Code § 72-718***; see also ***Sund v. Gambrel***, 127 Idaho 3, 896 P.2d 329 (1995) (A compensation agreement approved by the Commission is *res judicata* with respect to matters actually determined by that agreement.) Further, Commission approval of a lump sum agreement constitutes a final judgment on the merits of a claim. ***Jackman v. Industrial Special Indemnity Fund***, 129 Idaho 689, 931 P.2d 1207 (1997).

Courts around the country have agreed that a claimant may properly release and waive future workman's compensation claims against a defendant in the course of a settlement agreement. See, e.g., ***Moore v. Campbell, Wyatt & Cannon Foundry***, 142 Mich. App. 363, 369 N.W.2d 904 (1985) (Claimant signed a broadly-worded redemption agreement releasing the employer and carrier from liability for any other injuries which

may occur during his employment and, thus, four years later when claimant petitioned for benefits for silicosis, the court held that the petition was barred by the agreement); ***Gates Rubber Co. v. Cantrell***, 678 So. 2d 754 (Ala. 1996) (settlement agreement between the claimant and the employer releasing the employer from all future claims barred a later action for retaliatory discharge).

In this case, Wernecke cannot argue that the Lump Sum Settlement Agreement at issue was ambiguous or did not state her rights with regard to future suits against ISIF with particularity. Wernecke explicitly and fully discharged ISIF from liability from any and all claims forever, including claims related to a future injury/accident not related to those raised in the litigation from which the Agreement was based. Further, Wernecke fully understood that the agreement forever concluded and disposed of all claims of any kind that she may have had in the future against ISIF. The Commission, upon reviewing the Agreement to determine if it was in Wernecke's best interests, entered an order approving the settlement.

It is immaterial to the collateral estoppel analysis in this case that Wernecke could have incurred a future injury which would involve a completely new set of facts. The issue to be estopped is not the future injury itself or the new set of facts or circumstances surrounding such injury. The issue is limited to Wernecke's ability to raise new claims of total disability against ISIF. There is little doubt that this issue was clearly decided in the earlier suit.

Therefore, the issue of whether Wernecke was barred from ever bringing a claim against ISIF in regards to a future accident/injury was fully litigated and actually decided. The Order approving the settlement and discharging the parties of liability had

the effect of a final judgment on the merits. Wernecke is clearly barred from attempting to re-litigate this issue against ISIF in this action by attempting to assert claims for liability against ISIF in contravention of the Lump Sum Settlement Agreement.

Similarly, the concept of res judicata (claim preclusion) bars Wernecke from attempting to assert ISIF's liability for a portion of her total and permanent disability payments in this proceeding. For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment. *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002).

Wernecke is attempting to once again litigate the same claim as in the prior suit – her right to worker's compensation benefits against ISIF – when that claim was fully adjudicated and concluded with a final judgment barring Wernecke from asserting any future liability against the ISIF. In the prior adjudication, the effect of the Lump Sum Settlement Agreement was an adjudication of all worker's compensation claims that Wernecke had against ISIF at that time or may have had in the future. The Commission necessarily decided the issue of Claimant's rights to present and future worker's compensation benefits during that case when it approved the Lump Sum Settlement Agreement and dismissed the case.

Wernecke cannot seek further relief under a claim for worker's compensation benefits in this action when that claim was completely extinguished and final judgment rendered in connection with the Lump Sum Settlement Agreement in 1994. That judgment acts as a bar to Wernecke's right to pursue the same claim – the right to recover worker's compensation benefits from ISIF as a result of an industrial accident – in this proceeding.

D. Wernecke has Waived or should be Estopped from Asserting the Current Claim for Total and Permanent Disability Benefits against ISIF

Wernecke attempts to avoid the application of the doctrine of waiver and estoppel in this matter by arguing that she made an ill-advised mistake in entering into the Lump Sum Agreement and that I.C. § 72-318(2) exists to prevent a claimant from mistakenly waiving their rights to worker's compensation benefits. However, neither argument is helpful to Wernecke on appeal.

Waiver is a voluntary, intentional relinquishment of a known right or advantage. ***Brand S Corp. v. King***, 102 Idaho 731, 734, 639 P.2d 432 (1981). "It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which [the party] might at [the party's] option have demanded and insisted upon." ***Crouch v. Bischoff***, 78 Idaho 364, 304 P.2d 646 (1956). "Waiver arising out of conduct is in the nature of estoppel." ***Idaho Bank of Commerce v. Chastain***, 86 Idaho 146, 383 P.2d 849 (1963). It is an equitable doctrine based upon fairness and justice and, in order to establish waiver the intention to waive must clearly appear, although it may be established by conduct. ***Hecla Mining Co. v. Star-Morning Mining Co.***, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992).

Wernecke cannot reasonably argue that she was mistaken in entering into the Agreement at issue. She was represented and advised by counsel. Indeed, Wernecke fully advocated for the adoption of the Agreement in front of the Commission. The terms of the Agreement fully establish that Wernecke clearly, intentionally, voluntarily and knowingly waived her right to seek future benefits from ISIF. Further, as discussed above, I.C. § 72-318 cannot reasonably be interpreted as disallowing parties to a

worker's compensation suit from entering into settlement agreements barring a claimant from asserting any future claims against a defendant.

Alternatively, there is a sufficient basis for the conclusion that Wernecke should be estopped from seeking benefits from ISIF in this suit.

. . . The doctrine of quasi-estoppel has its basis in acceptance of benefits; it precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him or her. The doctrine applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced or of which he accepted a benefit. The act of the party against whom the estoppel is sought must have gained some advantage to himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position. (internal citations omitted).

Mitchell v. Zilog, Inc., 125 Idaho 709, 874 P.2d 520 (1994). The doctrine of quasi-estoppel does not require a false representation. It is designed to prevent a party from imposing an unconscionable disadvantage upon another, by changing positions. ***Young v. Idaho Department of Law Enforcement, Alcohol Beverage Control Division***, 123 Idaho 870, 875, 853 P.2d 615 (Ct.App. 1993). "The doctrine of quasi-estoppel may be invoked against a person asserting a right inconsistent with a position previously taken by him, with knowledge of the facts and his rights, to the detriment of the person seeking to apply the doctrine." (citation omitted). ***Young***, 123 Idaho at 875.

Clearly, Wernecke's complaint in this matter for payment of total and permanent disability benefits against ISIF asserts a position that is inconsistent with the position previously taken by Wernecke in the prior action with ISIF. Wernecke both knew and acknowledged that by signing the Agreement, she was releasing ISIF of any future claims which she may have had against the Fund. Now Wernecke has attempted to take the inconsistent position that the prior Agreement was unlawful and does not

operate to bar her current claim against ISIF. This position clearly prejudices and disadvantages ISIF, as well as defeats the fundamental fairness and purpose of the worker's compensation system. Wernecke gained the benefit of receiving the lump sum payment and it would be unconscionable to allow Wernecke to maintain the position that she may now assert claims against ISIF in contravention of her earlier position when signing the Agreement.

E. Public Policy Considerations Actually Justify Dismissal of Wernecke's Appeal

Wernecke's final argument on appeal is an impassioned plea that the Court should turn aside ISIF's attempt to "avoid its statutory obligation" under the worker's compensation system by contracting it away. However, Wernecke does not attempt to address the important public policy considerations of the Worker's Compensation laws which encourage the settlement of claims and the finality of judgments.

Certainly, the settlement of claims may potentially involve a worker's compensation claimant getting less than the full measure of benefits she might ultimately receive if the case were fully litigated. However, the fact that parties to such a proceeding may ultimately determine to resolve the matter through settlement should not lead one to the cynical conclusion that they have attempted to avoid statutory responsibilities or ignored the greater good of workers in the state of Idaho. The settlement of claims serves the good of the claimant, saves the expense of a drawn out proceeding and allows the worker's compensation system to work efficiently and to the best interests of all parties involved.

Instead, Respondent would note the public policy concerns inherent in the position Wernecke has advanced in this matter. Wernecke accepted the benefit of the

Lump Sum Agreement at issue. She did not appeal the Commission's final order approving the settlement. Now Wernecke attempts to attack an order which she directly participated in advancing to the Commission. Perhaps Wernecke hopes that adjudication of her current claimed injuries against ISIF will result in a settlement equivalent of a 60% disability. Of course, under Wernecke's rationale, she would then be able to later attack to viability of that settlement and, if injured a third time, advocate for the entitlement of total and permanent disability benefits against ISIF a third time. Public policy supporting the finality of judgments should be upheld in this matter.

IV.

CONCLUSION

Ultimately, the Industrial Commission's Order on Petition for Declaratory Ruling in this matter should be upheld. ISIF was fully within its statutory authority when it entered into a Lump Sum Settlement Agreement with Wernecke which also served to resolve any future claims of disability Wernecke may have raised against ISIF. Further, since Wernecke did not timely appeal the Commission's acceptance of that Agreement, there is no statutory or appellate authority allowing her to attack that final judgment in the context of this proceeding. Finally, res judicata, waiver, estoppel and public policy considerations support the dismissal of Wernecke's appeal.

DATED this 11 day of February 2008.

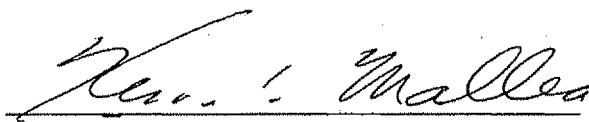
By Kenneth L. Mallea
Kenneth L. Mallea
Attorney for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of February, 2008, I served a true and correct copy of the foregoing **RESPONDENT'S BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Charles L. Graham
Landeck, Westberg, Judge & Graham, PA
P.O. Box 9344
Moscow, Idaho 83843
Telephone: (208) 883-1505
Facsimile: (208) 883-4593
Attorneys for Appellant

<input checked="checked" type="checkbox"/>	U.S. Mail, postage prepaid
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile


Kenneth L. Mallea

APPENDIX

Exhibit A – 4/26/06 Complaint Ms. Wernecke filed against ISIF

RECEIVED BY

ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, P.O. BOX 83720, BOISE, IDAHO 83720-0041

APR 28 2006

COP

WORKERS' COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)

CLAIMANT'S NAME AND ADDRESS Patsy Wernecke, Box 236 Fernwood ID 83830	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Charles L. Graham, PO Box 9344 Moscow ID 83843
EMPLOYER'S NAME AND ADDRESS St. Maries Joint School Dist. #41 PO Box 384, St. Maries ID 83861	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS Mark T. Monson, PO Box 8456 Moscow ID 83843
I.C. NUMBER OF CURRENT CLAIM 03-515254	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS State Insurance Fund, PO Box 83720 Boise ID 83720
DATE OF INJURY 10/8/02	

NATURE AND CAUSE OF PHYSICAL IMPAIRMENT PRE-EXISTING CURRENT INJURY OR OCCUPATIONAL DISEASE

Injury to cervical spine with 2-level fusion (low back condition).

STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:

See attached

DATE

4/26/06

SIGNATURE OF PARTY OR ATTORNEY

Charles L. Graham

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of April, 2006, I caused to be served a true and correct copy of the foregoing Complaint upon:

Manager, ISIF PO Box 83720
Dept. of Administration Boise, Idaho 83720-7901

via: ☐ personal service of process
☒ regular U.S. Mail

Claimant's Name Patsy Wernecke
Box 236
Fernwood, ID 83830
Address

via: ☐ personal service of process
☒ regular U.S. Mail

Employer's Name St. Maries Joint School Dist. #41
PO Box 384, St. Maries ID 83861
Address

via: ☐ personal service of process
☒ regular U.S. Mail

Surety's Name State Insurance Fund
PO Box 83720
Boise ID 83720
Address

via: ☐ personal service of process
☒ regular U.S. Mail

☐ I have not served a copy of the Complaint upon anyone.

NOTICE: Pursuant to the provisions of Idaho Code § 72-334, a notice of claim must first be filed with the Manager of ISIF not less than 60 days prior to the filing of a complaint against ISIF.

You must attach a copy of Form IC 1001 Workers' Compensation Complaint, to this document.

An Answer must be filed on Form IC 1003 within 21 days of service in order to avoid default.

WORKERS' COMPENSATION COMPLAINT AGAINST THE
INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)

Patsy Wernecke

State why you believe that the Claimant is totally and permanently disabled:

Claimant has a 5 pound lifting restriction with her right upper extremity (dominant); sitting limitation of 20 minutes; TABE scores of reading 6.4, math computation 3.9, applied math 6.9, language 4.2, vocabulary 7.2, language mech 4.4, spelling 5.0. The combination of medical and non-medical factors render claimaint unemployable in the St. Maries labor market.